

October 17, 2001 (11:06AM)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONOFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFFBEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

Docket No. 72-22-ISFSI

PRIVATE FUEL STORAGE, LLC
(Independent Spent Fuel
Storage Installation)

ASLBP No. 97-732-02-ISFSI

October 10, 2000

STATE OF UTAH'S MOTION TO COMPEL NRC STAFF TO RESPOND TO
STATE'S TWELFTH SET OF DISCOVERY REQUESTS
(Contention L, Part B)

Pursuant to 10 C.F.R. §§ 2.742, 2.744, and 2.790, the State hereby moves the Board to compel the Staff to answer certain discovery requests propounded in State of Utah's Twelfth Set of Discovery Requests Directed to the NRC Staff (September 18, 2001) ("State's 12th Set") relating to Utah L, Part B (seismic exemption).

FACTUAL BACKGROUND

The State submitted its 12th Set of Discovery Requests to the Staff on September 18, 2001. Responses to Requests for Admissions were due by September 28 and to Document Requests by October 3, 2001. On September 26, when the Staff requested an extension of time to respond, it advised the State that the Staff was that day submitting a modification to its Rulemaking Plan, SECY-98-126, to the Commission. The Staff requested an extension because it said it would need to revise its discovery responses in light of the modification to SECY 98-126. After agreeing to a limited extension of time to respond, on October 3, 2001 the Staff submitted its Objections and Responses to the State's 12th Set of Discovery, and by letter on October 5, 2001, the Staff advised the State of the availability of a limited

number of public documents and produced a six page log of documents it claimed as privileged. No other documents were produced by the Staff.

The State's dispute with the Staff centers around the Staff's failure to respond to Requests for Admissions and Documents relating to any proposed change to the geological and seismological characteristics for the siting and design of dry cask ISFSIs (*i.e.*, Requests for Admission No. 5-13 and 15-17; Document Requests No. 5-14). The State also takes issue with the Staff's responses relating to the rationale behind the grant of a seismic exemption to INEEL (Request for Admission No. 4) and the distinction between "Median" and "Mean" annual probability of exceedance in Reg. Guide 1.165 (Requests for Admission Nos. 26-27).

Counsel for the State contacted counsel for Staff to discuss the discovery responses but they were unable to resolve their differences.

ARGUMENT

I. The Standard for Discovery Against the Staff for Requests for Admissions Is on the Same Footing as For Any Other Party and Is One of Broad Relevance.

The State has authority to seek requests for admission under 10 CFR § 2.742. While the State understands that discovery against the Staff is often on a different footing than discovery against other parties, this is not the case with requests for admissions. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-26, 40 NRC 93, 95-96 (1994). Neither 10 CFR § 2.742 nor any other NRC regulation provides for any different treatment of the Staff. Cf 10 CFR § 2.742 and the special provisions for discovery against the Staff in 10 CFR §§ 2.720(h), 2.740(f)(3), 3.740a(j), 2.741(e), 2.744 and 2.790.

Unless otherwise determined by the Presiding Officer, discovery extends to “any matter, not privileged, which is relevant to the subject matter involved in the proceeding.”

10 C.F.R. § 2.740(b)(1). The Commission gives its discovery rules the same “broad and liberal treatment” that is given to the discovery rules of the U.S. Federal Courts.

Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 461-62 (1974). Discovery is considered relevant unless it is “palpable that the evidence sought can have no possible bearing upon the issues.” *Id.* at 462, *quoting* Hercules Powder Co. v. Rohn & Haas Co., 3 F.R.D. 302, 304 (D. Del. 1943). A motion to compel need not seek information which would be admissible *per se* in an adjudicatory proceeding, and need only request information which “reasonably could lead to obtaining [admissible] evidence.”

Safety Light Corp. (Bloomsburg Site Decontamination), LBP-92-3A, 35 NRC 110, 111-12 (1992); *see also*, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-102, 16 NRC 1597, 1601 (1982); Commonwealth Edison, 7 AEC at 462.

II. The Board May Order Production of NRC Documents.

Pursuant to 10 CFR § 2.744(c), upon objection by the Staff (through the Executive Director of Operations) to produce documents, the Board may compel production of documents if they are shown to be relevant, necessary to a proper decision, and not reasonably obtainable from another source. *Id.* § 2.744(d). If necessary, the Board may review such documents *in camera*. *Id.* § 2.744(c). If the documents found necessary to a proper decision in this proceeding are exempt from disclosure under § 2.790, the Board may order production subject to protective terms and conditions. *Id.* 2.744(e).

III. The Discovery Sought by the State is Relevant and Necessary to a Proper Decision in this Proceeding and the Staff's Responses Should Be Compelled.

A. The Rulemaking Plan

The State's discovery propounded on the Staff was prompted by the Commission's decision, CLI-01-12. In that decision the Commission found that PFS used the existence of the Rulemaking Plan, SECY-98-126, as a justification for allowing it to use a probabilistic seismic hazard analysis and that "PFS essentially adopted the staff's reasoning when it agreed to use the 2000-year return period the staff recommended." CLI-01-12, 53 NRC 459, slip op. at 15 and 17 (2001). Moreover, the Commission found that the State may rely, in part, on SECY-98-126, "to support its claim that a 10,000-year return period is the appropriately conservative standard." *Id.*, slip op. at 16.

The State's discovery requests, Admissions No. 5-13 and 15-17 and Document Requests No. 5-14, probed the Staff to determine whether the Staff was in the process of changing SECY-98-126, developing other seismic siting standards, or expediting rulemaking. In general, the Staff objected that the requested admissions and documents were pre-decisional, and thus, privileged. The State submits that in this instance, the Staff must be compelled to respond because its responses are necessary to a proper decision in this proceeding and the information cannot be obtained elsewhere. *See Vogtle*, 40 NRC at 94-95.

Information from the Staff is necessary to the outcome of this case because if the Staff is changing seismic standards under Part 72 or expediting rulemaking, then the Staff may use this procedural posture in litigating Utah L, Part B. Moreover, the Staff could revise

its rationale for recommending that PFS be granted a seismic exemption by relying on the rationale for changes to Part 72 or modification of the existing rulemaking plan. In discussing this matter with Staff counsel, he suggested that the Staff will produce the modified Rulemaking Plan, if and when it is approved by the Commission, and that should satisfy the State's requests. But that places the State at an unfair disadvantage because, based on information and belief, one of PFS's named expert witnesses has had direct involvement in the review and/or development of changes to the rulemaking plan.

In response to the State's 11th set of discovery to PFS, dated September 21, 2001, PFS admitted that one of its named experts for Utah L "has received or reviewed a copy of a 2001 or 2000 draft set of new geological and/or seismological standards for the siting and/or design of dry cask ISFSIs produced by or for NRC." *See* Applicant's Response and Objections to State's 11th Set of Discovery (October 2, 2001), at 9. In addition, the Applicant stated that it will cause such a document to be produced to the State, subject to any potential claims of privilege asserted by the NRC Staff. *Id.* at 19.

Both the Staff's and PFS's experts have access to the review and development of changes to Part 72 or the rulemaking plan. As before, PFS may adopt the Staff's reasoning supporting the Staff's new seismic revisions. Thus, the State is placed at an extreme and unfair disadvantage in developing its case on this issue because it does not have access to the relevant information that is available to its adversaries. It is not only the final changes that the Commission may approve that are relevant to Utah L, Part B, but also the development of those changes that led up to the final proposal submitted to the Commission. The Staff may argue that its changes to the Rulemaking Plan or Part 72 are generic issues but PFS is

the only away-from-reactor ISFSI that is affected by these changes. This is not a generic issue but an issue that has been remanded by the Commission to the Board for a full and fair adjudicatory hearing.

The State is willing to have access to the requested information and hold it as non-public information provided that the State can use the information in this proceeding. Under these circumstances, it is imminently fair and necessary that the Board order the Staff to respond to Requests for Admission Nos. 5-13 and 15-17 and produce documents responsive to Document Requests Nos. 5-14.

B. The Safety Evaluation Report

The State's discovery propounded on the Staff was also prompted by the Staff's Safety Evaluation Report ("SER"), specifically § 2.1.6, Geology and Seismicity. In the SER the Staff found acceptable PFS's use of a probabilistic seismic hazard analysis and a 2,000 year return period, based, in part, on an exemption the Staff granted to INEEL and based on the relationship between the median and mean probabilities of exceeding a safe shutdown earthquake for commercial power reactors. SER at 2-45. Because the Commission found that PFS essentially adopted the Staff's reasoning for a 2000-year return period earthquake, the information is not obtainable elsewhere. Accordingly, it is essential that the Staff respond to discovery relating to its reasoning in the SER.

Request for Admission No. 4 relates to the INEEL exemption and the unique circumstances existing at that federal site. Admission Request No. 4 requests the Staff to acknowledge that without the exemption, the ISFSI at INEEL would have had to meet a higher design basis standard than the one used at INEEL's existing high risk nuclear facility.

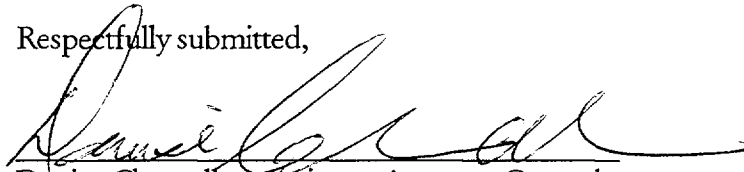
All that is requested is an admission or a denial. Requests No. 26 and 27 relate to whether the Staff understands the distinction between the "median" and "mean" annual probability of exceedance of $1.0E-5$. See Reg. Guide 1.165. If the Staff is going to rely on this concept as part of its reasons for granting PFS an exemption, then these admissions are answerable by the Staff. There is no legitimate justification for the Staff's refusal to answer Requests for Admission Nos. 4, 26 and 27 and the Board should order the Staff to respond.

CONCLUSION

For the foregoing reasons, the State requests the Board to order the Staff to respond to the disputed discovery requests.

DATED this 10th day of October, 2001.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Denise Chancellor", written over a horizontal line.

Denise Chancellor, Assistant Attorney General
Fred G Nelson, Assistant Attorney General
Connie Nakahara, Special Assistant Attorney General
Diane Curran, Special Assistant Attorney General
Laura Lockhart, Assistant Attorney General
Attorneys for State of Utah
Utah Attorney General's Office
160 East 300 South, 5th Floor, P.O. Box 140873
Salt Lake City, UT 84114-0873
Telephone: (801) 366-0286, Fax: (801) 366-0292

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S MOTION TO COMPEL NRC STAFF TO RESPOND TO STATE'S TWELFTH SET OF DISCOVERY REQUESTS was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 10th day of October, 2001:

Rulemaking & Adjudication Staff
Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington D.C. 20555
E-mail: hearingdocket@nrc.gov
(original and two copies)

G. Paul Bollwerk, III, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: gpb@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: jrk2@nrc.gov
E-Mail: kjerry@erols.com

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: psl@nrc.gov

Sherwin E. Turk, Esq.
Catherine L. Marco, Esq.
Office of the General Counsel
Mail Stop - 0-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: set@nrc.gov
E-Mail: clm@nrc.gov
E-Mail: pfscase@nrc.gov

Jay E. Silberg, Esq.
Ernest L. Blake, Jr., Esq.
Paul A. Gaukler, Esq.
Shaw Pittman, LLP
2300 N Street, N. W.
Washington, DC 20037-8007
E-Mail: Jay_Silberg@shawpittman.com
E-Mail: ernest_blake@shawpittman.com
E-Mail: paul_gaukler@shawpittman.com

John Paul Kennedy, Sr., Esq.
David W. Tufts
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84111
E-Mail: dtufts@djplaw.com

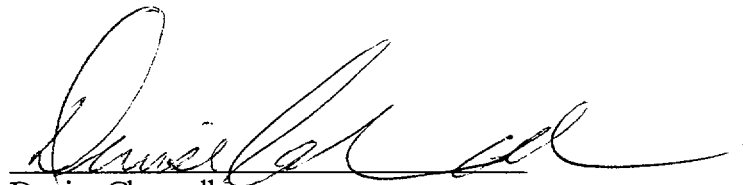
Joro Walker, Esq.
Land and Water Fund of the Rockies
1473 South 1100 East, Suite F
Salt Lake City, Utah 84105
E-Mail: utah@lawfund.org

Larry EchoHawk
Paul C. EchoHawk
Mark A. EchoHawk
EchoHawk PLLC
140 North 4th Street, Suite 1
P.O. Box 6119
Pocatello, Idaho 83205-6119
E-mail: paul@echohawk.com

Tim Vollmann
3301-R Coors Road N.W. # 302
Albuquerque, NM 87120
E-mail: tvollmann@hotmail.com

James M. Cutchin
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-Mail: jmc3@nrc.gov
(*electronic copy only*)

Office of the Commission Appellate
Adjudication
Mail Stop: O14-G-15
U. S. Nuclear Regulatory Commission
Washington, DC 20555

A handwritten signature in black ink, appearing to read "Denise Chancellor", written over a horizontal line.

Denise Chancellor
Assistant Attorney General
State of Utah